UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA, and
STATE OF VERMONT,

Plaintiffs

v.

TOWN OF BENNINGTON, *et al.*,

Defendants.

Civ. Nos. 2:97-CV-197 and
2:97-CV-208

JOINT MOTION TO ENTER CONSENT DECREE

Plaintiffs, the United States of America and the State of Vermont, and the defendants,[1] respectfully move this Court to approve, sign and enter as a final judgment the Consent Decree which was lodged with this Court on June 30, 1997 (the "Consent Decree"). The Consent Decree resolves the United States' and the State's claims against the defendants regarding the Bennington Landfill Superfund Site located in Bennington, Vermont. Notice of the Consent Decree was published in the Federal Register on July 3, 1997. 62 Fed. Reg. 36078-79. The comment period has ended and the United States has received no comments regarding the settlement.

[1] The defendants in this case are: Town of Bennington, Vermont, Textron, Inc., Bijur Lubricating Co., Eveready Battery Company, Inc., Johnson Controls, Inc., Add, Inc., Bennington College, Central Vermont Public Service Corporation, Chemfab Corporation, Courtaulds Structural Composites, Inc., G-C-D-C, Inc. (f/k/a Bennington Iron Works, Inc.), H.M. Tuttle Co., Inc., MASCO/Schmelzer Corporation, Sibley Manufacturing Co., Inc./CLR Corporation, Southwestern Vermont Medical Center, Triangle Wire and Cable, Inc., U.S. Tsubaki, Inc., Vermont Agency of Transportation and Vermont Bag and Film, Inc.

The Consent Decree is fair, reasonable, consistent with the statutory scheme of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et. seq.*, and in the public interest. The United States has submitted a memorandum in support of this motion which is attached hereto. The parties respectfully request that this Court sign the Consent Decree and enter it as a final judgment. The parties also request expedited entry of the Consent Decree.

ON BEHALF OF THE UNITED STATES:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA, and
STATE OF VERMONT,

Plaintiffs,

v.

TOWN OF BENNINGTON, *et al.*,

Defendants.

Civ. Nos. 2:97-CV-197 and
2:97-CV-208

UNITED STATES' MEMORANDUM IN SUPPORT OF
JOINT MOTION TO ENTER CONSENT DECREE

Plaintiff, the United States of America, respectfully submits this Memorandum in support of the parties' Joint Motion to Enter the Consent Decree lodged with this Court on June 30, 1997, concerning the Bennington Landfill Superfund Site ("Site") located in Bennington, Vermont.

Pursuant to 42 U.S.C. § 9622(d) and 28 C.F.R. § 50.7, the Consent Decree was published in the Federal Register on July 3, 1997. 62 Fed. Reg. 36078-79. The comment period has ended and the United States has received no comments regarding the settlement. As the settlement is fair, reasonable, consistent with the statutory scheme of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et. seq.*, and in the public interest, the Court should approve the Consent Decree and enter it as a final judgment. Moreover, because no party will oppose this motion, the Court should enter the Consent Decree without delay.

BACKGROUND

The Site is located in Bennington, Vermont and is located on the site of a former municipal landfill. The Town of Bennington ("Town") operated the landfill from 1969 through 1987. Liquid industrial wastes were disposed of in an unlined lagoon at the Site from 1969 through 1975. The United States and the State of Vermont ("Governments") contend that a number of companies, including the parties to the Consent Decree, other than the Town, generated the hazardous substances that were disposed of at the Site. The Town closed the lagoon in 1975 due to a threat to drinking water supplies related to migrating contamination.

As a result of the landfill's operations the soil and groundwater at the Site have become contaminated with hazardous substances including polychlorinated biphenyls ("PCBs") and volatile organic compounds ("VOCs"). The Site has been on the National Priority List ("NPL") since March 31, 1987.

There are two ponds and a wetland adjacent to the Site which provide habitat for migratory birds. The Governments assert that the landfill's operations caused the ponds and wetland to become contaminated, resulting in the degradation of these habitats. Migratory birds are a natural resource under the trusteeship of the U.S. Department of the Interior ("DOI"), and the ponds and wetland are natural resources under the trusteeship of the State of Vermont ("State").

Beginning in June 1991, 12 potentially responsible parties ("PRPs") (all of whom are parties to the Consent Decree) performed a Remedial Investigation and Feasibility Study at the Site pursuant to two Administrative Orders by Consent issued by EPA. EPA Docket No. CERCLA I-91-1093 and CERCLA I-91-1094. Beginning in January

1994, a group of ten PRPs conducted, under EPA oversight, a further feasibility study to evaluate the cost, effectiveness, and implementability of various remedies to address the contamination at the Site.

In December 1994, EPA issued an Action Memorandum in which it formally selected a non-time critical removal action ("NTCRA") to respond to the release and threatened release of hazardous substances at the Site. The NTCRA comprises: (1) excavation and consolidation of contaminated soils and sediments within the landfill; (2) design, construction, maintenance and operation of a composite barrier low-permeability cap with drainage controls, a leachate collection system and a gas management system; (3) diversion of upgradient groundwater; (4) site management; (5) implementation of institutional controls to prevent exposure to and migration of hazardous substances; and (6) long-term monitoring of groundwater.

The Consent Decree provides for five parties, the Town, Textron, Inc., Bijur Lubricating Co., Eveready Battery Company, Inc. and Johnson Controls, Inc (the "Performing Parties") to perform the NTCRA, except for the long-term groundwater monitoring.[2] The value of this work is estimated at $7.6 million. The Decree also provides for the Performing Parties to reimburse the United States for its oversight costs to the extent those costs exceed $750,000 as well as to reimburse the United States for other response costs it incurs in the future in connection with the remedy.

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[2] Once initial construction of the remedy is completed and EPA has approved the completion of work report, the United States and the State of Vermont will perform the groundwater monitoring.

The Consent Decree also provides for the Performing Parties to implement a wetlands restoration project on a parcel of Town-owned property in Bennington. The project entails restoring natural conditions to 2.5-acres of a former water resource area within the Town, and is estimated to cost $172,000. It is anticipated that the restored wetland will provide a habitat for migratory birds as well as for frogs and salamanders. The Decree also provides for the Performing Parties to pay DOI $16,600 for assessment costs and future oversight costs.

The Consent Decree provides for the remaining settlers[3] to pay $1.8 million, in aggregate, in reimbursement of past and future response costs at the Site. This money will be used to partially fund the NTCRA.

The Consent Decree generally will provide the Performing Parties with releases for the Site, except for active remediation of groundwater, if EPA selects that as the final remedy for the Site. The Consent Decree will provide the other 14 defendants with a complete release for the Site pursuant to 42 U.S.C. § 9622(g), with protection against claims by other parties with respect to all costs incurred and to be incurred in connection with the Site and all natural resource damages assessment and restoration costs.

The Consent Decree was lodged with this Court on June 30, 1997. Notice of the Consent Decree was published in the Federal Register on July 3, 1997. 62 Fed. Reg.

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[3] The 14 remaining defendants are Add, Inc., Bennington College, Central Vermont Public Service Corporation, Chemfab Corporation, Courtaulds Structural Composites, Inc., G-C-D-C, Inc. (f/k/a Bennington Iron Works, Inc.), H.M. Tuttle Co., Inc., MASCO/Schmelzer Corporation, Sibley Manufacturing Co., Inc./CLR Corporation, Southwestern Vermont Medical Center, Triangle Wire and Cable, Inc., U.S. Tsubaki, Inc., Vermont Agency of Transportation and Vermont Bag and Film, Inc.

36078-79. The comment period has ended and the United States has received no comments regarding the settlement. The Consent Decree is now ripe for this Court's review.

ARGUMENT

It is by now well settled that a court should enter a CERCLA consent decree if the decree "is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve." *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 85 (1st Cir. 1990) (quoting House Report on the Superfund Amendments and Reauthorization Act of 1986, H.R. rep. No. 253, Part 3, 99th Cong. 1st Sess. 19(1985), *reprinted in* 1986 U.S. Code Cong. & Ad. News 3038, 3042); *United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1085 (1st Cir. 1994); *United States v. DiBiase*, 45 F.3d 541, 543 (1st Cir. 1995). As this Consent Decree meets the standard, the Court should enter the Decree.

A. The Standard of Review is Deferential

The standard to be applied by this Court in reviewing this Consent Decree is laden with judicial deference to CERCLA consent decrees, reflecting the general public policy favoring settlement. *Charles George*, 34 F.3d at 1085; *Cannons*, 899 F.2d at 84. The law favoring settlements "has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement." *Cannons*, 899 F.2d at 84. Thus, the policy favoring settlement "is particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of [EPA]. *Cannons*, 720 F. Supp. 1027, 1035 (D.Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990); *see United States v. Rohm & Haas*

Co., 721 F. Supp. 666, 685 (D.N.J. 1989) ("Respect for litigants, especially the United States, requires the court to play a much more constrained role."). Accordingly, the trial court "must defer heavily to the parties' agreement and the EPA's expertise." *Charles George*, 34 F.3d at 1085.

The public policy in favor of the resolution of litigation by settlement is particularly strong in CERCLA cases. *In Re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019, 1029 (D. Mass. 1989) (The "Congressional purpose is better served through settlements which provide funds to enhance environmental protection, rather than the expenditure of limited resources on protracted litigation"); *see Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1082 (1st Cir. 1986) ("early resolution of [CERCLA] disputes is a desirable objective"). Settlement of CERCLA cases is, thus highly favored because it helps effectuate basic policy goals of CERCLA.

B. The Consent Decree is Fair

Fairness of CERCLA settlement involves both procedural fairness and substantive fairness. *Cannons*, 899 F.2d at 86. Courts evaluate procedural fairness by considering the openness and candor of the bargaining process, and substantive fairness by considering the equity of the settlement in relation to the risks of litigation and in some measure in relation to other pertinent factors. *Cannons*, 899 F.2d at 86-88. *See also, United States v. Hooker Chems. & Plastics Corp.*, 607 F. Supp. 1052, 1057 (W.D.N.Y.). *aff'd*, 776 F.2d 410 (2d Cir. 1985) (in determining fairness, a court should look to factors such as "the good faith efforts of negotiation, the opinions of counsel, and the possible risks involved in litigation if the settlement is not approved.");

United States v. Charles George Trucking, Inc., 34 F.3d at 1089; *United States v. DiBiase*, 45 F.3d at 544, 545.

The proposed Consent Decree is fair. The negotiating process was certainly fair. The Governments and the Settling Defendants conducted arms-length negotiations during which the parties were represented by experienced counsel and unquestionably had adverse interests. In *Rohm & Haas*, *supra*, the court found that:

> where a settlement is the product of informed, arms-length bargaining by the EPA, an agency with the technical expertise and the statutory mandate to enforce the nation's environmental protection laws, in conjunction with the Department of justice... a presumption of validity attaches to the agreement.

721 F. Supp. at 681 (emphasis added) (citing *City of New York v. Exxon*, 697 F. Supp. 677, 692 (S.D.N.Y. 1988)). The negotiations in this matter, thus, include all the factors which support a finding of procedural fairness. Thus, the openness and candor of the negotiations are beyond question and settlement is procedurally fair.

The Consent Decree also is substantively fair. The Governments allege that Town is liable under CERCLA based on its status as the owner and operator of the Site. The Governments allege that the rest of the defendants are liable under CERCLA as the generators of hazardous substances that were disposed of at the Site. While no case is risk-free, the Governments believe they have strong liability cases against each of the defendants. Thus, the defendants' decision to fund and perform the bulk of the remaining work at the Site and to pay a portion of future costs demonstrates substantive fairness. Accordingly, the settlement also is substantively fair.

C. The Settlement is Reasonable and Consistent with CERCLA's Primary Goals

Three factors are relevant to determining whether a CERCLA settlement is reasonable: the decree's likely efficaciousness as a vehicle for cleansing the environment; satisfactory compensation to the public for response costs; and the risks and delays inherent in litigation. *Cannons*, 899 F.2d at 89-90.

The settlement provides for the Performing Parties to implement a relatively straightforward remedy at the Site. The settlement will ensure completion of the cleanup at the Site and therefore satisfies CERCLA's objective in ensuring that contaminated sites are cleaned up. There has been no challenge to the NTCRA, so the first criteria has been met.

The Consent Decree also is reasonable because it generates an adequate level of compensation for the response actions being performed. *Id.* at 89-90. Five of the companies that disposed of waste at the Site are now defunct. These five companies generated, in aggregate, a large portion of the total wastes that were disposed of at the Site and, therefore, would bear significant responsibility for cleanup costs if they still existed. In recognition of the defunct parties' responsibilities for Site cleanup costs, the Governments have agreed to certain concessions in connection with the settlement. Specifically, the United States has elected not to seek reimbursement of certain of its past costs and future oversight costs, and the Governments have committed to perform the long-term groundwater monitoring component of the NTCRA.[4] These concessions

[4] The Governments' commitments to perform the long-term groundwater monitoring are subject to available funding.

are estimated to be worth approximately $2 million. Notwithstanding these concessions, the Decree provides for the settlers to finance and perform the work which, with a value of $7.6 million, represents the lion's share of the cleanup work. Accordingly, the settlers' agreement to finance and perform the work not only well compensates the United States but is reasonable given the volume of wastes sent to the Site by the generator defendants and the status of the Town as an owner/operator of the Site.[5]

Finally, the settlement is reasonable because it appropriately reflects the risks and delays inherent in litigation of the underlying dispute. The proposed settlements minimize the time as well as the public resources that must be expended to resolve this dispute. Thus, the proposed Consent Decree satisfies the third element for reasonableness.

Given that environmental cleanup and accountability of responsible parties are the principal goals of CERCLA, the fairness and reasonableness inquiry is largely congruent with deciding whether a settlement is faithful to the statutory scheme. *Id.* at 90-91. This settlement meets a primary objective of CERCLA in that responsible parties are performing the lion's share of the Site cleanup. The settlement also meets the goals of CERCLA Section 122(g), 42 U.S.C. § 9622(g), by reaching an early resolution of the liability of those parties with minor responsibility for Site cleanup costs. The settlement also meets the goals of the statute to provide final resolution of liability

[5] It should be noted that the settlers already have performed the RI/FS and already have agreed to reimburse the United States for certain of its past costs, which collectively have a value of $4.9 million.

for settling parties. Since the dispute has been resolved by the parties without Court intervention, it serves CERCLA's goal of reducing, where possible, the litigation and transaction costs associated with response actions. *See Cannons*, 899 F.2d at 90; *United States v. Hooker Chems. & Plastics Co.*, 540 F. Supp. at 1072; *United States v. Rohm & Haas Co.*, 721 F. Supp. at 696. *See also United States v. Conservation Chem. Co.*, 628 F. Supp. 391, 403 (W.D. Mo. 1985).

D. The Consent Decree Is In the Public Interest

The reasons that demonstrate that the Consent Decree is consistent with the goals of CERCLA also establish that the settlement is in the public interest. As the settlement provides for clean-up work at the Site plus recovery of some of the costs to be incurred by the United States, it minimizes the expense to the United States to obtain such funds and clean-up. This Consent Decree is also consistent with the general public policy in favor of settlement to reduce costs to litigants, including the United States, and burdens on the courts. *See, e.g., Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) *cert. denied*, 464 U.S. 818 (1983). Therefore, this Consent Decree is in the public interest.

E. Immediate Entry As a Final Judgment Is Warranted

Because all of the parties to this action have jointly moved for entry of the Consent Decree, and the United States has received no comments objecting to the Consent Decree, the Consent Decree can be entered immediately.

Moreover, rapid entry of the Decree will promote a more rapid cleanup of the Site. The Performing Parties have indicated that they can begin implementation of the work as soon as the Consent Decree has been entered, and that if the Consent Decree

is entered by August 15, 1997, they will be able to complete two significant portions of the remedy, *i.e.*, construction of the groundwater diversion trench and the leachate collection system, before the end of the year. If entry of the decree is delayed beyond August 15, 1997, however, the Performing Settling Defendants may not be able to complete these important parts of the remedy until next year. Accordingly, the United States requests expedited entry of this Decree in order to expedite completion of the remedy at the Site.

These considerations also serve to support the United States' request that this Consent Decree be entered as a final judgment pursuant to Fed. R. Civ. P. 58 and 54. The standard governing entry of a judgment as final under Fed. R. Civ. P. 54 was set forth in *Consolidated Rail Corp. v. Fore River Railway Co.*, 861 F.2d 322 (1st Cir. 1988). As explained by the district court in *Cannons*:

> First, a court must determine that it is dealing with a final judgment for purposes of 28 U.S.C. § 1291. Second, a court must determine in its discretion that there is no just reason for delay, such as the risk of piecemeal review. Finally, a court is required to specifically enumerate all of the factors and concerns relied upon when reaching its decision.

Cannons, 720 F. Supp. at 1053. Here, the Consent Decree plainly constitutes a final judgment concerning the above-mentioned defendants within the meaning of 28 U.S.C. § 1291, because it represents and "ultimate disposition" of the claim, *Id.* (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956)), and because it resolves "all liability of the settling defendants on 'cognizable claim[s] for relief' brought by plaintiffs under CERCLA." *Id.* (*quoting Curtiss-Wright Corp. v. General Electric Corp.*, 446 U.S. 1, 7 (1980)).

Under *Consolidated Rail*, the second prong of the test is to be satisfied in part by an examination of "whether finality of judgment will advance the interest of judicial administration and public policy." 861 F.2d at 325. The consent decree will do so by providing for the environmental cleanup at the Site and providing finality to the settling defendants, *Cannons*, 720 F. Supp. at 1053. Moreover, in view of the the parties joint motion for the Court's entry of the Consent Decree, there is no danger of undue fragmentation of the case. *See Consolidated Rail*, 861 F.2d at 325.

There is, therefore, no just reason to delay the entry of final judgment as to the Settling Defendants and, accordingly, this Court should enter the Consent Decree as a final judgment pursuant to Fed. R. Civ. P. 58 and 54.

CONCLUSION

The proposed Consent Decree provides a full and fair resolution of the dispute that exists between the United States, the State and the Settling Defendants concerning the Site. The settlement is fair, reasonable, consistent with CERCLA, and in the public interest. Accordingly, this Court should grant the motion of the United States and enter the Consent Decree as a final judgment pursuant to Fed. R. Civ. P. 58 and 54.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this 8th day of August, 1997, caused copies of the foregoing "Motion to Enter" and supporting memorandum to be delivered by overnight mail, postage prepaid, to the following counsel of record in this case:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA, and STATE OF VERMONT, Plaintiffs v. TOWN OF BENNINGTON, *et al.*, Defendants.	Civ. Nos. 2:97-CV-197 and 2:97-CV-208

ORDER APPROVING AND ENTERING
CONSENT DECREE AS A FINAL JUDGMENT

WHEREAS, pending before this Court is a proposed Consent Decree between the United States of America, the State of Vermont and 19 defendants in connection with the Bennington Landfill Superfund Site, in Bennington, Vermont, and

WHEREAS, this Court finds that approval of the proposed Consent Decree will resolve all liability against the 19 defendants on all claims by the United States and the State.

NOW THEREFORE, it is this _____ day of _____, 1997, HEREBY

ORDERED that the proposed Consent Decree is approved and entered as a final judgment within the meaning of 28 U.S.C. § 1291.

_____

United States District Judge